53-A)

IN THE

Supreme Court of the United States

October Term. 1969

No. 1137

LOUIS L. FRIEDMAN,

Appellant,

v.

THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS AND BRIEF IN SUPPORT OF MOTION

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Motion to Dismiss

Louis J. Lefkowitz, Attorney General of the State of New York (Ruth Kessler Toch, Solicitor General and Jeremiah Jochnowitz, of counsel), moves this Court under Rule 16(1)(b) of the Rules thereof to dismiss the appeal in the above-entitled case on the ground that it does not present a substantial federal question and on the further ground that the dismissal of the prior appeal by appellant in *Louis L. Friedman v. Court on the Judiciary* (375 U. S. 10 [1963]) is *res judicata* or whether there is "a substantial federal question" in the above-entitled case.

BRIEF

Nature of Proceedings

This appeal is from the final judgment of the New York Court of Appeals dismissing appellant's claim for salary as an elected Justice of the New York Supreme Court allegedly due him from February 22, 1963, the date of the determination by the New York Court on the Judiciary removing appellant from his office, to February 17, 1965, the date of filing of the claim, and any future salary which might accrue to appellant on the claim, before entry of the judgment. The New York Court of Claims had previously granted the State's motion to dismiss appellant's claim on the ground that the Court lacked jurisdiction over the subject matter and that the claim failed to state a cause of action. The New York State Appellate Division of the Supreme Court, Third Department (by order dated February 1, 1968, as resettled by order dated March 19, 1968) reversed the judgment of the Court of Claims and remitted the matter to the Court of Claims. The Appellate Division by the same order granted leave to the State to appeal to the New York State Court of Appeals and certified the following questions which were decisive of the correctness of its determination:

> "1. Was the Appellate Division correct in reversing the order and judgment of the Court of Claims for the reason that the judgment of the Court on the Judiciary was not *res judicata* as to the present claim?
>
> 2. Does the Court of Claims have jurisdiction of the subject matter of the claim?
>
> 3. Does the claim state a cause of action?"

The Court of Appeals answered the first two questions in the affirmative and the third question in the negative.

Appellant moved the Court of Appeals to reargue or to amend its remittitur. The Court of Appeals on September 25, 1969, denied the reargument but amended its remittitur to recite:

> "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, *viz.*: whether the rights of claimant under the First, Fifth, Sixth and Fourteenth Amendments were denied. The Court of Appeals held that there was no denial of claimant's constitutional rights (See 24 N. Y. 2d 528)."

Questions Involved

1. Was this Court's dismissal of appellant's prior appeal of his ousting by the New York Court on the Judiciary, *res judicata* as to his claim for salary after he was ousted?

2. Are the provisions of the New York State Constitution providing that a judge may be removed "for cause"* so indefinite as to be violative of appellant's constitutional rights?

3. Were the charges served upon appellant so indefinite and was the notice that he received of those charges so short that appellant's constitutional rights to a fair trial were violated?

4. Is the question of whether the New York Court on the Judiciary being properly constituted under the New York State Constitution a federal question or a state question to be determined by the New York State Court of Appeals?

* New York State Constitution, former Article VI, § 9-a, under which the proceedings to remove appellant was started, is set forth in the appendix to this brief.

Facts

The claim was for that portion of appellant's salary as a Justice of the New York Supreme Court payable by the State, allegedly due appellant from February 22, 1963 to February 17, 1965, totaling $41,769.84. It also demanded judgment for additional amounts of salary which would become due "before the entry of the judgment".

The claim alleged that appellant was elected Justice of the Supreme Court in November of 1956 for a term ending December 31, 1970, and that the obligation of the State to pay the salary was a continuing one up to and including the end of his term; that the State's failure to pay the amounts due appellant by reason of his election as Justice of the Supreme Court was a violation of the New York Judiciary Law, § 142 and New York State Finance Law § 6; and that the failure to pay appellant deprived him of equal protection of the law both under the State and United States Constitutions.

The State moved to dismiss the claim on the ground that the New York Court of Claims lacked jurisdiction of the subject matter and also that the claim failed to state a cause of action. Both the State and the claimant, the appellant here submitted affidavits on the motion.

The affidavit in support of the State's motion revealed the following: Appellant was constitutionally removed from the office of Justice of the Supreme Court by the Court on the Judiciary on February 22, 1963, pursuant to State Constitution, Article VI, § 9a, that after his removal and on February 22, 1963, appellant sought an order to show cause from the Court on the Judiciary to vacate the decision of that Court; that the Court on the Judiciary treated the application for this order as a motion to vacate

its determination and denied the motion; that the petition to the Court on the Judiciary seeking the order to show cause raised the same issues as were presented to the Court of Claims; that appellant appealed to the New York State Appellate Division, Third Department, from the determinations of the Court on the Judiciary, and at the same time, brought a proceeding in that Court collaterally attacking the same determinations; that both the appeal and the collateral attack were dismissed on July 9, 1963 (*Matter of Friedman*, 19 A. D. 2d 120), that appellant also appealed from the determinations of the Court on the Judiciary to the Supreme Court of the United States (July 18, 1963) which appeal was dismissed on October 18, 1963 for want of a substantial federal question (*Matter of Friedman*, 375 U. S. 10);

Appellant in his affidavit in opposition to the State's motion alleged various grounds for contending that the determinations of the Court on the Judiciary were void. Those which he still maintains in this Court are:

(a) That the provision of the State Constitution that, of the six members of the Court, one shall be the Chief Judge of the Court of Appeals and the other the senior Associate Judge of the same Court, and if either, or both of them are absent, the Court of Appeals should select another Judge to take the place of the absentee, was not complied with; that the absence of Judge DYE on August 15, 1962 required that another Judge be substituted in his place, and this was not done.

(b) That appellant was served originally with two charges, and a general charge of unethical conduct; that two additional charges were presented at the trial, and that he was not notified of these charges within the time provided in the Constitution.

(c) That appellant was notified that the two additional charges were to be included approximately a month before the trial.

He also argued in the State Court that the term "removal for cause" was vague and, therefore, unconstitutional and that because the Court on the Judiciary acted as Grand Jury, Prosecutor, Judge and Jury, his removal was unconstitutional. He now asserts, in addition, that the Court on the Judiciary considered evidence outside the record made in that Court, to wit: a letter by Justice BELDOCK*, the Presiding Justice of the New York State Appellate Division, Second Department, the Department in which appellant had been serving as a Justice, requesting the convening of such a Court to consider matter involving the conduct of appellant, described in a report of the Appellate Division, Second Department, entitled *Matter of M. Malcolm Friedman*, 17 A. D. 2d 644 (1963).

The State's motion to dismiss was granted by the New York State Court of Claims, reversed by the Appellate Division, which certified the aforementioned questions, and remitted the matter to the Court of Claims. It was again reversed by the Court of Appeals, which dismissed the claim because it did not state a cause of action. In reaching its decision, the Court noted that the procedural defects alleged by claimant did not reach jurisdictional dimensions and did not deprive him of a fair trial.

Decision of the New York Court of Appeals.
21 N. Y. 2d 523.

Of the three questions certified by the Appellate Division, the Court of Appeals decided Question 3 adversely to appellant, *viz.*: Does the claim state a cause of action? In answering the other two questions in the affirmative, the Court held that the judgment of the New York State Court

* It should be noted that an entry in the minutes of the New York Court on the Judiciary, July 6, 1962, refers to a request for convening the Court received from Presiding Justice BELDOCK.

on the Judiciary was not *res judicata* as to the present claim and that the Court of Claims had jurisdiction over the subject matter of the claim, saying (532-533):

> "Claimant's attack on the removal is threefold. Initially he contends that the removal was a nullity because the failure to follow prescribed constitutional procedures with respect to the organization of the Court on the Judiciary and with respect to giving claimant and specified State officers timely notice of the charges deprived the court of subject-matter jurisdiction. Suffice it to say that we have carefully considered each of the alleged irregularities and find no merit to claimant's contention. The procedural defects, if any, relied upon by claimant do not reach jurisdiction dimensions and in no way deprived him of a fair trial.
>
> "Relying on the sweeping language contained in *Matter of Murchison*, 349 U. S. 133, 75 S. Ct. 623, 99 L. Ed. 942, claimant next contends that he was denied due process of law under the Fourteenth Amendment to the United States Constitution because the Court on the Judiciary acted as complainant, prosecutor and Judge. Additionally, he contends that the removal section of the State Constitution (art. VI, § 22, formerly § 9-a) which authorizes a removal 'for cause', without providing any standards to define the meaning of the term, is vague and indefinite and, therefore, violates the United States Constitution.
>
> "These contentions cannot serve as a basis for claimant's action, and in our opinion are without merit."

It then held that the dismissal of the prior appeal of appellant to this Court was *res judicata* on the federal questions. It distinguished between denial of a writ of certiorari which, it stated, imports no expression of opinion on the merits and dismissal of an appeal from a State Court judgment which, it held, is a decision on the merits as to the presence of any "substantial federal question". In

so deciding, it cited Rule 16(1)(b) of the Rules of this Court and Stern and Gressman, *Supreme Court Practice*, §§ 5-18.

The Court of Appeals not only held that the prior decision of this Court was *res judicata* on the existence of a "substantial federal question", but also held that the term "for cause" was not vague. In doing so, it compared the standard "for cause" to other standards being used, saying (pp. 541-542):

> "The 'for cause' standard contained in section 22 (formerly 9-a) of article VI is no more vague than standards of 'misconduct', 'maladministration', 'malfeasance' and 'malversation' in office or wilful and corrupt conduct in office which are traditionally found in statutes authorizing the removal of public officers (see, *e.g.*, Public Officers Law, Consol. Laws, c. 47, §§ 32, 36). Nor is the standard any more vague than the standard of "good behavior" with respect to Federal Judges contained in section 1 of article III of the United States Constitution.
>
> "In sum we find claimant's contention to be as wanting in substance as the United States Supreme Court did when it dismissed the claimant's appeal from the determination of the Court on the Judiciary 'for want of a substantial federal question'."

The Court also held that appellant's contention that the Court on the Judiciary was prosecutor and judge, was without merit. It distinguished the situation in the instant case from that in *Matter of Murchison*, 349 U. S. 133. Here, as distinguished from *Murchison*, there was no one-man grand jury holding its proceedings in secret chambers, but a trial in open court permitting cross examination of witnesses by appellant. Thus, the *Murchison* case did not fulfill the principle that a fair trial in a fair tribunal is the basic requirement of due process. But in the instant

case, as the Court of Appeals stated, the Court on the Judiciary had no interest in the outcome, nor did it pre-judge the facts. The Court on the Judiciary merely determined as a matter of law that there was a basis for preferral of charges. Final charges were then prepared by a counsel designated by the Court to conduct the proceeding. This, the Court of Appeals said, did not cause the Court on the Judiciary to become so intimately involved with the case so as to deprive appellant of an impartial tribunal.

Having reached this conclusion, it reversed the order of the Appellate Division and reinstated the judgment of the Court of Claims dismissing the claim.

ARGUMENT

The Court of Appeals correctly held that there was no denial of appellant's constitutional rights.

A. The dismissal by this Court of appellant's appeal from the determination of the Court on the Judiciary ousting him from his office is *res judicata* as regard to the present claim for salary during the period of his ousting.

The appellant's claim is for salary allegedly due as a Justice of the Supreme Court of the State of New York. It is predicated upon his contention that his removal by the Court on the Judiciary of the State of New York was void and that he is entitled to salary from the time of this determination to the present date.

Appellant was removed by the Court on the Judiciary by a determination made February 22, 1962. He immediately sought an order to show cause to that Court to vacate its determination. In the petition seeking the order to show cause he raised the same basic issues which were later presented to the Court of Claims of the State of

New York in the present claim. The Court on the Judiciary treated the order to show cause as a motion to vacate its determination and denied the motion *Matter of Friedman*, 12 N. Y. 2d a (Court on the Judiciary) saying (e):

> "*Thereafter*, LOUIS L. FREEDMAN *presented to the court his petition and a proposed order to show cause to vacate the said decision of the court, on the asserted grounds (1) that two of the members of the Court were not present when the court was convened on August 15, 1962 and that therefore the Court on the Judiciary was never properly composed; (2) that proper notice of all the charges within 60 days before the trial was not given to the Governor of the State of New York, the President of the Senate, the Temporary President of the Senate, and the Speaker of the Assembly; and (3) that the proceedings contravened the due process provision of the Fourteenth Amendment to the United States Constitution. On April 3, 1963 the court handed down the following decision:* (Italics by Court)
>
> "The court having treated the proposed order to show cause as a notice of motion to vacate the court's determination and having duly considered the matter, denies said motion. The Court on the Judiciary was duly convened pursuant to the Constitution and at all its sessions there were present members sufficient to constitute a quorum under the court's rules adopted pursuant to the provisions of the Constitution."

Appellant appealed to this Court from the determinations of the Court on the Judiciary to this Court. This Court granted a motion by the Court on the Judiciary, the appellee, to dismiss the appeal (375 U. S. 10 [1963]), saying:

> "The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question."

The New York Court of Appeals in its opinion considered whether the decision of this Court was *res judicata*

on the "federal question" (24 N. Y. 2d 528 [1969]), saying (pp. 538-539):

> "This, [that dismissal of an appeal imports no expression of opinion upon the merits of the case] is not true, however, where the Supreme Court dismisses an appeal from a State court 'for want of a substantial federal question'. As Messrs. Stern and Gressman state in their treatise on Supreme Court Practice (§ 5-18, pp. 195-196):
>
> '*When the Court feels that the decision below is correct and that no substantial question on the merits has been raised, it will affirm an appeal from a federal court, but will dismiss an appeal from a state court "for want of a substantial federal question."*' Only history would seem to justify this distinction; it would appear more sensible to affirm appeals from both state and federal courts when the reason for the summary disposition is that the decision below is correct. But if the bar fully understands that "dismissed for want of a substantial federal question" in a state court appeal is the equivalent of affirmance on the merits insofar as the federal questions under 28 U. S. C., § 1257 (1) and (2) are concerned, and is not limited to a determination of whether there is such a federal question, the difference in nomenclature does no harm.

This holding accords with Rule 16(1)(b) of this Court which reads as follows:

> "(b) The court will receive a motion *to dismiss an appeal from a state court on the ground that it does not present a substantial* federal question; or that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on; or that the judgment rests on an adequate non-federal basis." (Emphasis supplied.)

* Emphasis by the Court.

The dismissal by his Court on the appeal in *Friedman v. Court on the Judiciary*, was based upon there being no substantial federal question (and not for any of the other reasons for dismissal of an appeal set forth in Rule 16[1][b]).

If there were a substantial federal question here it would not have been the right to salary of a State officer but the propriety of his removal from office. This Court has already ruled on the propriety of his removel when it found there was no substantial federal question in the first appeal.

The situation here is almost identical with *Markham Advertising Co. Inc. v. Zahn*, 415 F. 2d 772 (U. S. Ct. of App. 9th Cir. [1969]), cert. den. ____ U. S. ____ (Dec. 19, 1969). *Markham* had originally brought an action in the State courts seeking a judgment declaring that it would be unlawful for respondents to require petitioners to remove outdoor advertising signs without compensation and, also, that it would be unlawful to require removal of such signs before the federal share of just compensation (75%) should be allocated for the purpose.

The State courts had dismissed the petition and an appeal was taken by petitioners to this Court, which dismissed it "for want of a substantial federal question" (393 U. S. 316). Thereafter, *Markham* brought an action in the United States District Court, Western District of Washington, Southern Division, seeking a declaratory judgment against being required to remove the outdoor signs without compensation. That Court summarily dismissed the complaint. Appeal was taken from the dismissal to the United States Court of Appeals for the Ninth Circuit, which Court Stated (415 F. 2d 772 [decided July 30, 1969]):

> "The District Court ruled that the issue of mandatory compensation was foreclosed by *res judicata*, having already been adjudicated by the Washington State courts, *Markham v. State Highway Commission*, 73 W. D. 2d 413, 439 P. 2d 248 (1968), and the decision of the Supreme Court of the United States dismissing the appeal from the decision of the Supreme Court of Washington, *supra*, for want of a substantial federal question. 393 U. S. 316 (1969).
>
> "We agree."

The petitioners sought review by this Court, through a writ of certiorari, of the affirmance of the dismissal of their complaint by the Ninth Circuit. The issue of whether this Court's dismissal of the appeal from the judgment of the State Court was *res judicata* in the second action brought in the United States District Court was briefed by both petitioners and respondents in the certiorari proceedings. This Court denied certiorari on December 19, 1969 (___ U. S. ___).

It should also be noted that the doctrine of *res judicata* is applicable not only to questions raised in the former proceeding but to any question which might have been raised. See *Chicot County Drainage District v. Baxter State Bank, et al.*, 308 U. S. 371 (1940) where this Court said (p. 378):

> "Such a view is contrary to the well-settled principle that *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end.' *Grubb v. Public Utilities Comm'n, supra; Cromwell v. County of Sac, supra.*"

Every question now raised in the instant appeal either was or could have been raised in appellant's first appeal to this Court. It is submitted that, accordingly, the dismissal

of the _____ appeal from the determinations of the Court on the Judiciary is *res judicata* as to any action brought by petitioner for salary as a Supreme Court Judge where such action is based on the premise that petitioner never was validly dismissed from his judicial post by the Court on the Judiciary.

B. The Court of Appeals correctly held that the removal of a judge "for cause" and the procedures used by the Court on the Judiciary were not violative of appellant's constitutional rights.

The Court of Appeals after holding that there had been a final determination on the merits by this Court barring the raising again the federal issues, nevertheless considered them and correctly decided that there was no violation of appellant's constitutional rights in this matter.

On the question of violation of appellant's constitutional rights, the Court of Appeals said (24 N. Y. 2d 528, 540):

> "It must be remembered that the power of removal is designed to insure efficiency and fidelity in the discharge of official duty. The office of a Judge is so delicate that it is difficult, if not impossible, to enumerate and define, with legal precision, the conduct for which a Judge ought to be removed (*cf. Ex parte Secombe*, 19 How. [60 U. S.] 9, 14, 15 L. Ed. 565 [dealing with disbarment of an attorney]).
>
> Thus it is widely recognized that 'the degree of incompetency or misconduct which amounts to sufficient cause for removal must of necessity, within certain established limits, rest somewhat in the sound discretion in the officer [or body] in whom the power of removal is vested' (*Matter of Saushier v. Wheeler*, 252 App. Div. 267, 270, 299 N. Y. S. 466, 472; *Farish v. Young*, 18 Ariz. 298, 158 P. 845; 4 McQuillin, Municipal Corporations, § 12.234, and cases cited therein). Although the body which exercises the power of removal is vested with broad discretion where the term 'cause'

> is not defined, it is manifest that the power cannot be exercised arbitrarily. The phrase 'for cause' clearly means 'legal cause'—some cause affecting or concerning the ability or fitness of the incumbent to perform the duty imposed upon him (*People ex rel. Mandaq v. Board of Fire Comrs.*, 72 N. Y. 445, 449)."

In *Sarisohn v. Appellate Div., Second Dept., Supreme Court of the State of New York* (265 F. Supp. 455), the Federal District Court also had to determine whether the words "for cause" were vague and also upheld the constitutionality of a removal of a Judge by the Appellate Division "for cause", saying (p. 458):

> "The words 'for cause' mean for a cause to be enumerated and specified in each particular instance so that the defendant may be duly notified and adequately prepared to defend the charges. It does not mean that a judge may be removed for 'cause' without more and without an enumeration of the charges constituting the alleged 'cause'. It would be impossible to enumerate in any statute all the possible grounds and circumstances justifying the removal of a judicial officer. Guidelines may be found in the Canons of Ethics, applicable to both attorneys and judges, adopted by the American Bar Association and other bar associations, and also in the general moral and ethical standards expected of judicial officers by the community. 'For cause' has been defined in several cases involving the removal of judicial officers and they provide a reasonable person with a competent definition of this phrase."

Appellant contends that his constitutional rights were violated because the Court on the Judiciary combined the functions of complainant, prosecutor and judge. That Court having received a complaint from the Presiding Justice of the New York State Appellate Division, Second Department, considered the charge and then appointed attorneys to prosecute. This is no different than a Court which orders an accused held for trial, appointing counsel

to defend him. All the essentials of fair play were afforded appellant here. He was represented by an attorney who had the right to cross examine the accusing witnesses and who vigorously defended him. The Court of Appeals distinguished the situation in the instant case from that in *Matter of Murchison, supra*, 349 U. S. 133 (1955), saying (24 N. Y. 2d 518, 543-544):

> "The proceedings in the Court on the Judiciary are a far cry from the *Murchison* case, where the Trial Judge not only pressed the charges, acted as a witness and could fairly be likened to a party, but the right of cross-examination—a fundamental right, the deprivation of which is error of the first magnitude (*Smith v. Illinois*, 390 U. S. 129, 131, 88 S. Ct. 748, 19 L. Ed. 2d 956)—was virtually nonexistent.
>
> "There is simply no basis for holding that the procedure followed by the Court on the Judiciary deprived claimant on a fair trial in a fair and impartial tribunal. Here the Court on the Judiciary was not the accuser, for it was the report of the Supreme Court Justice which served as the complaint. Nor can it be said that the Court on the Judiciary had an interest in the outcome of the case because it reviewed the allegations in the complaint in order to ascertain, as any court would on a demurrer or motion, whether basis existed for preferral of charges. In other words, far from prejudging the facts, the Court on the Judiciary merely determined, as a matter of law, that the report contained facts sufficient to constitute ground for the preferral of charges. The final charges were preferred by counsel designated by the court, but it cannot be assumed that, because the court designated the attorneys to conduct the proceeding, the court became so intimately involved with the case as to deprive claimant of an impartial tribunal. If this were the law, the People would have cause to object in every criminal case in which a Trial Judge assigns counsel for an indigent defendant and presides at the trial."

In *Matter of Osterman v. Court on the Judiciary*, 13 N. Y. 2d (a), cert. den. 376 U. S. 914 (1964), a judge was removed under the same sections of the New York State Constitution by a subsequently called Court on the Judiciary. The very same issues generally presented here were, before the Court in *Osterman*, yet *certiorari* was denied.

Appellant also contends that the Court on the Judiciary considered evidence outside the record. He bases this contention on the following statement in the opinion of the Court of Appeals (24 N. Y. 2d 518, 530):

> "In 1956 claimant, Louis Friedman, was elected to the office of Supreme Court Justice for a term expiring on December 31, 1970. On July 2, 1962 the Presiding Justice of the Appellate Division, Second Department, pursuant to the State Constitution (art. VI, § 9-a [now § 22]), requested the then Chief Judge of the Court of Appeals to convene the Court on the Judiciary to consider matters involving the conduct of the claimant disclosed in a report of a Justice of the Supreme Court filed in the Appellate Division, Second Department, in a disciplinary proceeding entitled *Matter of M. Malcolm Friedman* (see 17 A. D. 2d 644) brought against claimant's brother."

There is nothing in the record of the proceedings in the Court on the Judiciary nor in the records of any of the many courts in which appellant has heretofore sought relief, either by appeal from or by indirect attack on the determination of the Court on the Judiciary, that this letter and the report were considered by the Court on the Judiciary in reaching its determination. The letter* and report were the complaint which resulted in the Court on the Judiciary being convened. The Court on the Judiciary after a preliminary examination determined that suf-

* The minutes of the Court on the Judiciary for July 6, 1962 show that the Court was convened after request from Justice Bel-dock.

ficient cause existed for preferring charges and charges were served upon appellant. Appellant had an opportunity to answer the charges and answered them. Thereafter, evidence was presented by the prosecuting and defense attorneys. The appellant duly represented by counsel contested these charges. He was given a full opportunity to cross-examine all witnesses and present testimony in his own behalf. After hearing all the testimony the Court made its determination. Nowhere has it been shown that the complaint of the Presiding Justice of the Appellate Division and report were considered by the Court on the Judiciary except in the first instance to determine whether charges should be made. The judgment of the Court was solely on the evidence presented at the trial. The original investigation of the complaint in order to determine whether charges should be brought was not a violation of appellant's constitutional rights.

C. The notices given appellant of the charges were both adequate and specific and appellant cannot attack either at this point having proceeded to trial and awaited adverse judgment of the Court before contesting them.

Appellant contends that his constitutional rights were violated in that he was not given adequate or specific notice of all the charges brought against him.

He was timely served with the following three charges alleging unethical conduct:

> "That Louis L. Friedman has abused his public office as a Justice of the Supreme Court of the State of New York, Second Judicial District (1) by interfering with and obstructing a Judicial Inquiry and Investigation ordered by the Appellate Division of the Supreme Court of the State of New York Second Judicial Department, on the 21st day of January 1957; (2) by engaging in unethical and improper conduct in

that, while a Justice of the Supreme Court, he maintained in his judicial chambers exclusive custody, control and management of the moneys, accounts, books and financial records of the firms of Friedman and Friedman and M. Malcolm Friedman without properly preserving or accounting therefor and, moreover, would not surrender the same to M. Malcolm Friedman despite reasonable and proper demands therefor; (3) by violating and failing to observe the concept, spirit and letter of the canons of judicial ethics, and by causing M. Malcolm Friedman to violate and to fail to observe the canons of professional ethics."

Within 60 days petitioner was served with the following two additional charges:*

"(1) that claimant had allegedly practiced law in violation of the Constitution of the State of New York, and (2) that claimant had supposedly violated the Income Tax Laws of the State and Federal Governments."

These additional charges were encompassed in the original Charge 3. The second additional charge may be disregarded because the Court made no finding that appellant had violated the tax laws of the State and Federal Government.

The decision of the Court on the Judiciary on the charges was as follows (12 N. Y. 2d [d] [e]):

"(1) That Louis L. Friedman interfered with and obstructed a Judicial Inquiry and Investigation ordered on the 21st day of January, 1957 by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department;

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* Petitioner stated that he was served with these additional charges on December 10, 1962—32 days before the trial (Pet'r Br. in N. Y. State App. Div., p. 16). He, however, knew of these charges on October 19, 1962 for he states the prosecution sought to incorporate them in a stipulated record (Pet'r Jurisdictional Statement, pp. 9, 10).

"(2) That said LOUIS L. FRIEDMAN engaged in unethical and improper conduct in that, while a Justice of the Supreme Court, he maintained in his judicial chambers exclusive custody, control and management of the moneys, accounts, books and financial records of the firms of Friedman and Friedman and M. Malcolm Friedman without properly preserving or accounting therefor and, moreover, would not surrender the same to M. Malcolm Friedman despite reasonable and proper demands therefor;

"(3) That said LOUIS L. FRIEDMAN by his actions as to the Shevack claim violated and failed to observe the concept, spirit and letter of the canons of judicial ethics;

"(4) That by the acts and omissions described in findings Nos. 1, 2 and 3 hereinabove, said LOUIS L. FRIEDMAN abused his public office as a Justice of the Supreme Court of the State of New York;

"(5) That said abuse of public office and said acts and omissions are sufficient cause for the removal from office of said LOUIS L. FRIEDMAN;"

Finding 1 falls within Charge 1 of the original charges.

Finding 2 falls within Charge 2 of the original charges.

Finding 3 falls within Charge 3 of the original charges.

Findings 4 and 5 are conclusions based upon Findings 1, 2 and 3.

Since what appellant was found guilty of was covered in the original charges, his objection to not being given timely service of the other charges is immaterial.

Petitioner knew before he went to trial that he was served with the additional charges. He could have objected to going to trial and demanded additional time to prepare. He did not. He went to trial on the charge and it was only after an adverse decision was rendered that he sought to

raise the question. In doing so, he waived whatever irregularity there may have been in the service of the additional charges.

An analogous situation delaying raising a question was considered in *People* v. *White*, 2 N. Y. 2d 220 (1957), app. dis. and cert. den. 353 U. S. 969 (1957) where the Court of Appeals said (p. 225):

> "[The defendant] did not once appropriately raise the question of whether defendant's right to a speedy trial had been violated until his appeal in the Appellate Division."

And in holding against the defendant explained (p. 224):

> "The rational of this rule is that a defendant cannot participate in a trial and save his objection in this respect to challenge an adverse verdict."

In *Humes* v. *United States*, 186 F. 2d 875 (U. S. Court of Appeals, 10th Cir. [1951]), the Court said (p. 878):

> "Having failed to request the court for time to secure and leave to introduce further evidence, after Gercina testified in rebuttal, he may not now claim prejudice by surprise."

and in *Crocklin* v. *United States*, 252 F. 2d 561 (U. S. Court of Appeals, 5th Cir., the Court said (p. 562):

> "The general rule is well illustrated here: that an accused may not by failing to ask for a mistrial, gamble on winning before the jury, and then, for the first time, on appeal ask for a reversal when he loses his gamble."

In *Campbell* v. *United States*, 355 F. 2d 394 (U. S. Court of Appeals, 7th Cir. [1966], cert. den. 385 U. S. 922), the Court refused to reach the merits because of failure of the petitioner to make timely objection, saying (395):

> "[1, 2] We do not reach the merits of the petitioner's claim because we are convinced that it is not

available as a ground for a collateral attack upon his sentence. We have examined the trial record. At no time did the petitioner's counsel object to the comments or move for a mistrial. Ordinarily, such failure constitutes a waiver of the right to assert error on appeal. *United States* v. *Wright*, 309 F. 2d 735, 738 7th Cir. 1962), cert. denied, 372 U. S. 929, 83 S. Ct. 873, 9 L. Ed. 2d 733 (1963); *Langford* v. *United States*, 178 F. 2d 48, 55 (9th Cir. 1949), cert. denied, 339 U.S. 938, 70 S. Ct. 669, 94 L. Ed. 1355 (1950). If such a failure to object or move for a mistrial precludes a reversal upon direct appeal, *a fortiori* such failure must similarly preclude relief under section 2255. *Kapsalis* v. *United States*, 345 F. 2d 392, 394 (7th Cir. 1965)."

Similarly here, appellant, not having raised the question of timeliness of the service of the additional charges but having gone ahead with the trial on the merits, cannot raise the question after the charges were decided adversely to him.

D. The question of whether the Court on the Judiciary was properly constituted is not a federal question, and the determination of the Court of Appeals that it was, is not subject to federal court review.

Appellant also contends that the Court on the Judiciary was not organized as prescribed by the New York State Constitution. He contends that the failure of two judges to attend the first meeting (Judge Dye of the Court of Appeals and Judge Rabin of the Appellate Division, First Department) prevented the Court from legally coming into existence. Appellant is wrong.

The Court had already been convened and was in legal existence before that session. Former Article VI, § 9-a(4), of the New York Constitution provided for the convening of a Court on the Judiciary as follows:

> "The chief judge of the court of appeals may convene the court on the judiciary upon his own motion, and shall convene the court upon written request by the governor or by the presiding justice of any appellate division or by a majority of the judicial council or a majority of the executive committee of the New York state bar association thereunto duly authorized."

The minutes of the Court on the Judiciary (Exhs. A-B attached to appellant's affidavit of February 17, 1965) show that on July 2, 1962 Hon. George J. Beldock, Presiding Justice of the Appellate Division, Second Department, requested Chief Judge Charles S. Desmond to convene the Court on the Judiciary to consider matters involving the conduct of petitioner. The minutes further show the following notations for July 6th:

> "Notification by Chief Judge Desmond to the Presiding Justice of each of the four Departments of the Appellate Division to designate a Justice pursuant to Section 9-a of Article VI of the Constitution and notification of the convening of the Court on the Judiciary to consider matters concerning the conduct of Justice Louis L. Friedman as outlined in the request for convening the court received from Presiding Justice Beldock.
>
> "Notification to Judge Marvin R. Dye, Senior Associate Judge of the Court of Appeals."

These minutes also show the designation of one justice from each of the State's Appellate Divisions to serve on the Court, the last on July 18th being the designation of Justice Benjamin J. Rabin to serve as a member from the First Department.

Thus, according to the minutes of the Court on July 6, 1962, the Court was constitutionally convened by Chief Judge Desmond. Its composition was determined by July 18th, and by that time, it certainly was a legal entity.

Appellant argued that under Article VI, § 9-a the absence or inability or disqualification of a Judge of the Court on the Judiciary means his inability to attend one session. This is a strained and erroneous construction. (Chief Judge DESMOND, in his letter to the other Judges of the Court at the time the proposed order to show cause was submitted to them, maintained that this section was not applicable to a temporary absence [63].) The absence of a Justice of the Supreme Court from one of its sessions would not dissolve the Court and void its actions. In the instant case, the whole Court attended the entire trial except for the session of August 15, 1962. The whole Court received the evidence in this case and rendered the decision. The failure of two judges to attend one session did not make every ruling of the Court invalid. The action of the entire Court in proceeding with the case ratified whatever was done on August 15, 1962.

In any event, the question of whether the procedure followed by the Court on the Judiciary was proper under the New York State Constitution was a matter for the New York Court of Appeals to decide and they have held it proper, saying (24 N. Y. 2d 518, 537):

> "Claimant's attack on the removal is threefold. Initially he contends that the removal was a nullity because the failure to follow prescribed constitutional procedures with respect to the organization of the Court on the Judiciary and with respect to giving claimant and specified State officers timely notice of the charges deprived the court of subject-matter jurisdiction. Suffice it to say that we have carefully considered each of the alleged irregularities and find no merit to claimant's contention. The procedural defects, if any, relied upon by claimant do not reach jurisdictional dimensions and in no way deprived him of a fair trial."

The determination of the New York Court of Appeals on these questions since they are entirely State matters, should be sustained.

It follows, therefore, that the absence of two judges from the first session did not violate appellant's constitutional rights.

CONCLUSION

No substantial federal question is presented by this appeal and the Court should grant appellee's motion to dismiss.

Dated: February 24, 1970.

Respectfully submitted,

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APPENDIX

Constitution. Former Art. 6 § 9-a

"§ 9-a. [REMOVAL OR RETIREMENT OF JUDGES AND JUSTICES BY COURT ON THE JUDICIARY.]

(1) A judge of the court of appeals, a justice of the supreme court, a judge of the court of claims, a surrogate, a special surrogate, a judge of the court of general sessions of the county of New York; a county judge, a special county judge or a justice of a city court of record, may be removed or retired also by a court on the judiciary. The court shall be composed of the chief judge of the court of appeals, the senior associate judge of the court of appeals and one justice of the appellate division in each department designated by concurrence of a majority of the justices of such appellate division. In the absence, inability or disqualification of the chief judge of the court of appeals or of the senior associate judge of that court, the court of appeals shall designate a judge or judges from the court of appeals to act in his or their stead.

(2) No judicial officer shall be removed by virtue of this section except for cause or be retired except for mental or physical disability preventing the proper performance of his judicial duties, nor unless he shall have been served with a statement of the charges alleged for his removal or the grounds for his retirement, and shall have had an opportunity to be heard.

(3) The trial of charges for the removal of a judicial officer or of the grounds for his retirement shall be had before a court on the judiciary. The affirmative concurrence of not less than four members of the court shall be necessary for the removal or retirement of a judicial officer.

The court in its discretion may suspend a judicial officer from the exercise of his office pending the determination of the proceedings before the court. The action of the court shall not extend further than to remove from office, or removal from office and disqualification to hold and enjoy any public office of honor, trust or profit under this state, or to retirement for disability; but any judicial officer whose removal is sought shall be liable to indictment and punishment according to law. A judicial officer retired for disability in accordance with this section shall thereafter receive such compensation as the legislature may provide.

(4) The chief judge of the court of appeals may convene the court on the judiciary upon his own motion, and shall convene the court upon written request by the governor or by the presiding justice of any appellate division or by a majority of the judicial council or a majority of the executive committee of the New York state bar association thereunto duly authorized. The chief judge of the court of appeals shall act as the presiding officer of the court but in the absence, inability or disqualification of the chief judge, the senior associate judge of the court of appeals sitting on the court shall act as the presiding officer. After the court on the judiciary has been convened and charges of removal have been preferred against a judicial officer, the presiding officer of the court shall give written notice to the governor, the president of the senate and the speaker of the assembly of the name of the judicial officer against whom such charges have been preferred, of the nature of the charges and the date set for the trial thereof, which date shall not be less than sixty days after the giving of such notice. Immediately upon receipt of such notice the legislature shall be deemed to be in session for the purpose of this proceeding.

(5) In the event that any member of the legislature shall, within thirty days after receipt of said notice, prefer the same charges against the judicial officer and such charges are entertained by a majority of the assembly the court on the judiciary shall be stayed pending the determination of the legislature, which shall be exclusive and final. But a proceeding by the court on the judiciary for the retirement of a judicial officer for mental or physical disability preventing the proper performance of his judicial duties shall not be stayed.

(6) The court shall have power (a) to designate in each case involving a judicial officer an attorney or attorneys at law to act as counsel to conduct the proceeding; (b) to summon witnesses to appear and testify under oath and to compel the production of books, papers, documents and records before such counsel in advance of the trial and before the court upon the trial; (c) to make its own rules and regulations concerning the procedure to be adopted for the investigation and trial of a judicial officer; (d) to grant immunity from prosecution or punishment when the court deems it necessary and proper in order to compel the giving of testimony under oath and the production of books, papers, documents and records, and (e) shall have such further powers as the legislature may from time to time confer upon it.

(7) The judges and justices while exercising the powers of a court on the judiciary shall serve without additional compensation, but the legislature shall provide moneys by appropriation to meet the expenses of the court."